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In the Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT R. FREEMAN, ET AL., PETITIONERS

v.

WILLIE EUGENE PITTS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether a school board can be required to eliminate racial imbalances in student assignments within its schools that are caused by demographic shifts in residential patterns unrelated to a prior segregated school system.

2. Whether federal courts must continue indefinitely to supervise student assignments in formerly segregated schools—even though the existing student assignments are free from the vestiges of unlawful discrimination—solely because other aspects of the school system retain vestiges of unlawful discrimination.

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INTEREST OF THE UNITED STATES

This case presents two important questions regarding judicial administration of school desegregation cases: (1) whether a school board can be required to eliminate racial imbalances in student assignments within its schools that are caused by demographic shifts unrelated to a prior segregated school system; and (2) whether federal courts must continue indefinitely to supervise student assignments in formerly segregated schools—even though the existing student assignments are free from the vestiges of unlawful discrimination—solely because other aspects of the school system retain vestiges of unlawful discrimination. The United States has responsibility for enforcing school desegregation under Titles IV, VI, and IX of the 1964 Civil Rights Act, 42 U.S.C. 2000c-6, 2000d, and 2000h-2, and the Equal Educational Opportunities Act

of 1974, 20 U.S.C. 1701 *et seq.*, and currently is involved in over 470 school desegregation cases, many of which would be affected by resolution of the issues presented by this case.

STATEMENT

1. Before the 1966-1967 school year, the DeKalb County School System (DCSS) in DeKalb County, Georgia, maintained dual attendance zones for blacks and whites. See Pet. App. 33a. In that school year, the DCSS replaced dual attendance zones with a system of geographic zones and a "freedom-of-choice" transfer plan. See *ibid.* Although some black students elected under the freedom-of-choice plan to attend schools that formerly had been legally restricted to whites only, most black students still attended the formerly black schools. See *id.* at 6a-7a, 33a, 74a.

In July 1968, black school children in DeKalb County and their parents instituted this class action, alleging that the schools in DeKalb County violated the Fourteenth Amendment because they were segregated on the basis of race. See Pet. App. 7a, 26a. Shortly after the action was filed, the DCSS, along with the federal Department of Health, Education and Welfare, voluntarily developed a plan to desegregate the County's schools. See *id.* at 26a. In June 1969, the district court approved the proposed plan, which enjoined the DCSS from discriminating on the basis of race; abolished the freedom-of-choice plan in light of *Green* v. *County School Board*, 391 U.S. 430 (1968); reassigned students to their neighborhood schools; and closed all six of the formerly de jure black schools. See Pet. App. 8a, 26a. Because the nonwhite population of DeKalb County at the time was quite small, all parties agree that "the closing of the black schools in 1969 did, for a time, result in the desegregation of the schools of DeKalb County," *id.* at 33a.

Around the time the plan initially was implemented, DeKalb County began to experience "phenomenal growth,"

Pet. App. 38a, and "rapid demographic changes," *id.* at 47a. In 1970, the County's population was approximately 350,000, and the DCSS served 74,741 students, of whom 5.6% were black students. See *id.* at 33a, 74a. By 1986, the County's population exceeded 450,000, see *id.* at 38a,[1] and black students constituted 47% of the 79,991 students enrolled in County schools, see *id.* at 3a-4a.

Dramatic shifts in residential patterns accompanied these demographic changes. In 1970, 7,615 non-whites lived in the northern part of DeKalb County; 11,508 non-whites lived in the southern part. See Pet. App. 38a. During the 1970s, southern DeKalb County's non-white population increased 661% to 87,583, primarily as a result of blacks moving in from nearby Atlanta. See *id.* at 6a-7a, 38a. At the same time, approximately 37,000 white residents moved from southern DeKalb County to neighboring counties. See *id.* at 7a, 38a. Meanwhile, in the northern portion of the County, "the number of whites grew tremendously," while the non-white population increased to only 15,365. *Id.* at 38a; see *id.* at 6a-7a. As a result, the northern portion of the County now is predominantly white and the southern portion is predominantly black. In light of the neighborhood school plan, these residential changes caused racial imbalances to develop in the student populations at the various schools.

In response to this shift in demographics, the DCSS in 1972 voluntarily implemented an M-to-M (majority-to-minority) transfer program. This program allows students who are members of a racial group that constitutes a majority in their neighborhood school to transfer to a school where their racial group is in the minority. See Pet. App. 39a. In addition, in the 1980s the DCSS instituted a magnet program in schools located in the center

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[1] "The district court and the parties agreed to use September, 1986, as a cut-off date for statistical information." Pet. App. 3a n.1.

of the County. See *id.* at 40a. Despite these efforts, by 1986 50% of the black students in the county attended schools that were more than 90% black, and 27% of the white students attended schools that were more than 90% white. See *id.* at 4a.

2. In January 1986—more than 16 years after the decree was imposed—the DCSS filed a motion in the district court, arguing that it had achieved unitary status and thus that the case should be dismissed. See Pet. App. 27a.[2] In July 1987, the court held a three-week trial to determine whether the DCSS had achieved unitary status. See *id.* at 9a. The court focused on the six "*Green* factors"—student assignment, faculty, staff, transportation, extracurricular activities, and facilities—that this Court outlined in *Green* v. *County School Board*, 391 U.S. 430, 439 (1968), as relevant in determining whether a school board has fulfilled its obligation to desegregate.[3] See Pet. App. 29a, 60a-71a. With respect

[2] For the most part, this case was inactive from the time of the original consent decree until 1975. See Pet. App. 8a, 26a n.1. From 1975 until January 1986, five motions were filed in the district court; three dealt exclusively with modifications to the M-to-M transfer program, and another successfully sought approval of a boundary line change proposed by the DCSS. In 1983, plaintiffs returned to the district court, contending that the expansion of a high school that had predominantly white students would have a segregative effect. Without holding a hearing, the district court found that the DCSS had achieved unitary status. It refused to bar the expansion of the high school, concluding that the DCSS had no discriminatory intent. See *ibid.* The court of appeals reversed, holding that it was improper to declare the DCSS unitary without a hearing, and that failure to consider the discriminatory effect resulting from expansion of the high school was error, without regard to the intent of the DCSS. *Pitts* v. *Freeman*, 755 F.2d 1423, 1427 (11th Cir. 1985). The January 1986 motion described in the text was filed promptly after the 1985 court of appeals decision.

[3] At the request of the parties, the district court also considered the "quality of education" when determining whether the DCSS had fully dismantled the dual school system. See Pet. App. 60a-71a. This appears to be an educational resource consideration closely related to the "facilities" factor described in *Green*.

to student assignments, the court found that "demographic shifts have * * * had an immense effect on the racial composition of the DeKalb County schools." *Id.* at 38a. The court stated that "[t]here is no evidence that the school system's previous unconstitutional conduct * * * contributed" either to the racial imbalance that now exists within the schools or to the "dramatic population shifts." *Id.* at 44a-45a. Indeed, the court found that "the same racial segregation would have occurred at approximately the same speed" regardless of any action by the DCSS, *id.* at 45a, and that the DCSS in fact "achieved maximum practical desegregation from 1969 to 1986," *id.* at 44a. Accordingly, as to student assignments, the court explained, the "DCSS has become a system in which the characteristics of the 1954 dual system have been eradicated, or if they do exist, are not the result of past or present intentional segregative conduct by defendants or their predecessors." *Id.* at 47a.

Based on these findings, the district court concluded that the DCSS had "fulfilled [its] constitutional obligations" Pet. App. 48a, and was "unitary" as to student assignments, *id.* at 71a. Accordingly, it refused to compel the DCSS to take further action to desegregate that aspect of operations. *Id.* at 48a, 71a-72a. The court also refused to order further relief in the areas of physical facilities, transportation, and extracurricular activities, because plaintiffs conceded that the DCSS had fulfilled its constitutional obligations in those areas as well. *Id.* at 59a. By contrast, the court found that vestiges of discrimination did remain with respect to faculty and staff assignments as well as per pupil expenditures. *Id.* at 55a-58a, 70a-72a. Thus, the court ordered further relief in those areas and explained that the DCSS "must comply with [its] dictates * * * before [it] * * * will declare that the DCSS has obtained unitary status." *Id.* at 72a.

3. The court of appeals reversed. Considering the *Green* factors, the Eleventh Circuit concluded that the district court erred in refusing to require the DCSS to eradicate racial imbalances caused by demographic changes. Pet. App. 19a. The court placed no significance on the district court's factual finding that "DeKalb County's demographic changes affected the DCSS," *id.* at 7a, but instead reasoned categorically that "[s]tudent segregation, prior to achieving unitary status, indicates that vestiges [of a dual] * * * system" still remain, *id.* at 20a. Accordingly, the court concluded that, because the DCSS had not removed all the vestiges of discrimination from its schools, it was required to remedy the student imbalances caused by demographic shifts. In the court of appeals' view, "[t]he DCSS may not shirk its constitutional duties by pointing to demographic shifts occurring prior to unitary status," but rather "must take affirmative steps to gain and maintain a desegregated student population" regardless of the cause of any existing disparities. *Id.* at 19a.[4]

The court of appeals also concluded that the DCSS cannot achieve unitary status unless and until it "maintains at least three years of racial equality in [the six *Green* categories]." Pet. App. 24a; see *id.* at 14a (stating that system must "fulfil[l] all six factors *at the same time*"). Thus, it reasoned that "a district court can order relief relating to *any* factor until a system achieves unitary status" with respect to all factors. *Id.* at 15a.

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[4] On appeal, neither party challenged the district court's rulings that the DCSS had fulfilled its constitutional obligations in the areas of transportation, extracurricular activities, and facilities. See Pet. App. 17a. The DCSS likewise did not challenge the district court's ruling as to its affirmative obligations in the areas of faculty, staff, and expenditures per pupil, but rather contended that it would achieve unitary status when it complied with that portion of the district court's order. See *id.* at 11a.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case demonstrates the need for this Court to elucidate the procedures district courts should follow in administering and terminating decrees in desegregation cases. The court of appeals held that a school district that had complied with a desegregation decree for more than 16 years, and that had removed all vestiges of a prior dual school system from its student assignments, could be required to take new affirmative steps—not described in the original decree—to eliminate racial imbalances in student assignments that arose during the pendency of the decree, even though the imbalances were caused by demographic changes, not the school district. This holding is inconsistent with the Equal Protection Clause and the decisions of this Court.

The first question presented in a case of this sort is whether the school district has achieved unitary status with respect to the area in question—in this case, student assignments. Under this Court's recent decision in *Board of Education* v. *Dowell*, 111 S. Ct. 630 (1991), a school district under court supervision attains unitary status when it satisfies a two-pronged test: first, it must comply in good faith with the desegregation decree for "a reasonable period of time," and second, it must eliminate "as far as practicable" the vestiges, or remnants, of unlawful discrimination. *Id.* at 637-638. In this case, the district court's findings—not reviewed by the court of appeals—suggest that this has been done with respect to student assignments, because the district court found that (i) the DCSS for more than 16 years complied in good faith with the desegregation decree; and (ii) the existing imbalances were not caused by any unlawful acts of the school district. If these findings are correct, the school district has satisfied its constitutional obligations with respect to student assignments.

The second issue is whether failure to remove the vestiges of discrimination from all facets of the school system (in this case, faculty and staff assignments and ex-

penditures per pupil) prevents the school district from being freed from continuing judicial supervision of a significant aspect (in this case, student assignments) with respect to which the school district *has* satisfied its constitutional obligations. This question should be resolved by use of a basic remedial principle fully applicable in this Court's desegregation cases: the remedy cannot go beyond the wrong. Once the school district has demonstrated that it has fulfilled all of its obligations with respect to an area such as student assignments—and thus has demonstrated that it has eliminated from that area as far as practicable any cognizable remnants of prior unlawful conduct—then the district court's remedial supervision in that area should cease. The fact that work remains to be done in other facets of the school district's operations does not demonstrate that subsequently-arising imbalances in student assignments can be linked to prior unlawful actions of the school district, and thus does not justify the heightened restrictions entailed by continued judicial supervision. Further actions of the school district in that area should be judged under the general principles of this Court's Fourteenth Amendment jurisprudence. See *Dowell*, 111 S. Ct. at 638.

The contrary approach taken by the court of appeals, on both issues, pointlessly would prolong judicial control of hundreds of school districts. That would be flatly inconsistent with this Court's injunction that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." *Milliken* v. *Bradley*, 418 U.S. 717, 741-742 (1974) (*Milliken I*).

Accordingly, the judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals with instructions that it review the district court's findings with respect to the cause of the racial imbalances within the schools. If the court of appeals does not find clear error in the district court's finding that the racial imbalances were caused by demographic shifts, rather than by unlawful actions of the school district, then it should release the school district from further supervision in the area of student assignments.

ARGUMENT

I. THE COURT OF APPEALS ERRED WHEN IT DETERMINED THAT THE SCHOOL DISTRICT HAD NOT FULFILLED ITS CONSTITUTIONAL OBLIGATIONS WITH RESPECT TO STUDENT ASSIGNMENTS

A. This Court's Decision In *Board of Education* v. *Dowell* Establishes that School Districts Are Entitled To Release from a Desegregation Decree When They Have Complied with the Decree for a Reasonable Period of Time and Eradicated as Far as Practicable the Remnants of Any Unlawful Discrimination

As this Court recognized earlier this Term in *Dowell*, decrees entered in desegregation cases "are not intended to operate in perpetuity." *Id.* at 637. Rather, "[f]rom the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination. * * * '[N]ecessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.'" *Ibid.* (quoting *Spangler* v. *Pasadena City Board of Education*, 611 F.2d 1239, 1246 n.5 (9th Cir. 1979) (Kennedy, J., concurring)). Like *Dowell*, this case presents the general problem of determining the circumstances and procedures under which district courts should release school districts from desegregation decrees. In our view, this process should be guided by the answers to two questions articulated in

Dowell: first, "whether the [school board] ha[s] complied in good faith with the desegregation decree since it was entered," and second, "whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable." 111 S. Ct. at 638.

1. The first question is straightforward: Has the school district complied with the desegregation decree in good faith for a reasonable period of time. Because at the commencement of a desegregation case a "district court need not accept at face value the profession of a school board which has intentionally discriminated that it will cease to do so in the future," *Dowell*, 111 S. Ct. at 637, district courts at that time may assume supervisory responsibility over many facets of school district operations. On the other hand, changes in a school board's personnel with the passage of time as well as "a school board's compliance with previous court orders [are] obviously relevant" to the question of whether it is reasonable to expect the school board to slide back into discriminatory practices if the district court stops supervising the operations of the school board. *Id.* at 637-638.

Thus, if the school board commits no new acts of invidious discrimination,[5] and if it complies with the decree

[5] It is true that simple nondiscrimination is inadequate to satisfy a school district's obligation to remedy prior invidious discrimination. Whatever its efficacy in other contexts, compliance with an admonition to "go and sin no more" is insufficient here; the school district is "clearly charged with the affirmative duty * * * to convert to a unitary system," *Columbus Bd. of Education* v. *Penick*, 443 U.S. 449, 458-459 (1979) (quoting *Green* v. *County School Board*, 391 U.S. 430, 437-438 (1968)). In our view, though, when the federal courts have entered a comprehensive desegregation decree, that decree and the district's obligation during the pendency of the decree to take all practicable measures to remove the vestiges of any prior invidious discrimination define the scope of the local district's "affirmative duty" to desegregate its schools. For the same reasons that "a school board is entitled to a rather precise statement of its obligations under a desegregation decree," *Dowell*, 111 S. Ct. at 636, we do not believe that a school district that has complied in good faith with the orders of the federal courts, and has not otherwise violated the Equal Protection Clause, should be subject to additional affirmative duties defined only in the context of a determination whether the school district has become unitary.

In this regard, we believe that if the parties to a desegregation decree believe that changed conditions have made the decree ineffective to deal with the problems at which it was directed, they have the burden to move promptly to seek revision of the decree according to the usual procedures for modifying injunctions. After all, a desegregation plan is a final judgment; motions to modify it should be made promptly; and satisfactory implementation of a judgment normally should discharge a defendant from further obligations. See generally Fed. R. Civ. P. 60(b)(5).

for a reasonable period of time,[6] there is no continuing basis for assuming that the school board will act wrong-

[6] The question of what period of time is a "reasonable" period is—like other questions of "reasonableness" in the law—not susceptible of a categorical answer. The answer may vary from system to system, and decree to decree. For example, it may be that distinctions should be drawn between decrees that immediately provide comprehensive and complete remedies and those that "call for * * * 'step at a time' plans by definition incomplete at inception," *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 435 (1976); compliance with a comprehensive plan may lead to unitary status more swiftly than compliance with incomplete, developing plans. Similarly, willful violations of a plan by local officials may justify a district court's decision to maintain scrutiny for a longer period of time.

Nevertheless, to the extent guidelines can be provided—and we believe clear guidelines are desirable in this area, see generally Brief Amicus Curiae of the National School Boards Association in Support of the Petition for Writ of Certiorari—our experience supports the approach adopted by the Fifth Circuit in *Youngblood* v. *Board of Public Instruction*, 448 F.2d 770 (1971), suggesting that a three-year period generally is the minimum necessary to ensure the school district's rehabilitation. Cf. *Spangler*, 427 U.S. at 434-437 (suggesting, in a case where a district had complied with a decree for three to four years, that the school district had satisfied its obligations with respect to student assignments). At the other end of the spectrum, successful compliance for thirteen years should be adequate in all but the most unusual cases, because at that point no child, in kindergarten through twelfth grade, ever will have attended a school operated in a discriminatory manner; a school

fully. See *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 472 (1979) (Stewart, J., concurring) ("The prejudices of school boards of 1954 * * * cannot realistically be assumed to haunt the school boards of today."). At this point, if the remnants of unlawful discrimination have been removed to the extent practicable (as discussed at pages 12-16, *infra*), the "strongly felt" need for "[d]irect control over decisions vitally affecting the education of * * * children," *Wright* v. *Council of the City of Emporia*, 407 U.S. 451, 469 (1972), mandates an end to continuing judicial supervision. Cf. *Milliken I*, 418 U.S. at 741-742 (describing the "deeply rooted" tradition of local control and automony as "essential * * * to quality of the educational process"); *Dowell*, 111 S. Ct. at 637 (citing *Milliken I*). Subsequent actions of the school board should be governed by the general principles of this Court's Equal Protection jurisprudence. See *Dowell*, 111 S. Ct. at 638.

2. Determining whether the district's actions have eliminated to the extent practicable all cognizable remnants of unlawful discrimination also should be a straightforward matter. This Court's cases offer two fundamental principles that should guide this inquiry.

First, this Court repeatedly has emphasized the importance of causation in placing an outer limit on the scope of a district court's authority. As this Court explained in *Milliken* v. *Bradley*, 433 U.S. 267 (1977) (*Milliken II*), a desegregation decree "must be designed as nearly as

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system that has complied with a federal court's decrees for an entire generation of students should be held unitary. On this point, we note that the Court earlier this Term in *Dowell* (where the district had complied with the decree for thirteen years—from 1972 until 1985—see 111 S. Ct. at 637), in framing the questions to be considered on remand, directed the district court to consider only whether the district had complied in good faith, not whether the period of compliance was sufficiently long, suggesting that thirteen years was a sufficent period of compliance in that case. See *id.* at 638. After such a period of compliance, lingering racial imbalances cannot be considered the proximate result of the district's prior violation. See also page 14, note 7, *infra*.

possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'" *Id.* at 280 (quoting *Milliken I*, 418 U.S. at 746). Accordingly, "federal-court decrees must directly address and relate to the constitutional violation itself. * * * [F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution and does not flow from such a violation." 433 U.S. at 282; see *Dowell*, 111 S. Ct. at 637 (same); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971) (noting that the "task is to correct * * * the condition that offends the Constitution"); *Milliken I*, 418 U.S. at 757 (Stewart, J., concurring). Thus, it is not appropriate to require a school board under a desegregation decree to remedy disparities arising out of private decisionmaking, economics, demographics, or similar matters. See, *e.g.*, *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 436 (1976) (remedy should not respond to demographic shifts "not attributed to any segregative actions on the part of [the school board]"). The school board's affirmative obligation is only to cure the problems proximately resulting from the constitutional violation.

Second, because a school desegregation order has the limited objective of the "elimination of discrimination in the public schools," *Swann*, 402 U.S. at 22, the decree should focus on features that are "inherent in dual school systems," *ibid.*, and should not "embrace all the other problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools," *id.* at 23. "The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage." *Id.* at 22.

"Vestiges," then, are best understood as "remnants": they must not only have been caused by the dual school

system, but themselves have been a part of the dual school system. Thus, federal courts readily should respond to such still-discriminatory features of formerly segregated school systems as inferior facilities for heavily minority schools, *e.g.*, *Swann*, 402 U.S. at 18-19; gerrymandered attendance and transportation zones, *e.g.*, *Penick*, 443 U.S. at 461-462 & nn. 8-10; maintenance of two high schools when a single high school readily could serve all students, *e.g.*, *Green*, 391 U.S. at 442 n.6 (describing with approval a proposal that would "eliminat[e] costly duplication * * * while at the same time achieving immediate dismantling of the dual system"); and separate teacher associations, student councils, or athletic leagues. On the other hand, desegregation decrees are not properly designed to alter features not inherent in the school system, such as uneven residential distribution [7] or disparities in income. Cf. *Austin Independent School District* v. *United*

[7] The intractable matter of uneven residential distribution is illustrative. As we have seen, a school board is responsible for correction only of the problems it has caused. But an inquiry in every desegregation case into the "unknown and perhaps unknowable factors" that cause residential imbalances, *Milliken I*, 418 U.S. at 756 n.2 (Stewart, J., concurring), promises the daunting, often unedifying, and—for many school districts—prohibitively expensive spectacle of a parade of social science experts. Although existing residential disparities should be taken into account "in fashioning a remedy" at the outset of a case to desegregate the school system, see *Swann*, 402 U.S. at 21, once a school district has complied with a decree and removed physical differences among the schools, the passage of time makes it more and more doubtful that the continuing residential imbalances properly are attributable to prior invidious discrimination by the school board. Long-term persistence of such imbalances surely must rest in large part on other factors, such as socioeconomic status, preferences for living in a particular community or near a particular employer or church, or even aversion to the inconvenience of moving. See *Penick*, 443 U.S. at 480-481 (Powell, J., dissenting) (noting that segregated housing patterns are found throughout the country, "caused by social, economic, and demographic forces for which no school board is responsible"); *id.* at 512 (Rehnquist, J., dissenting).

We suggest that by the time a school district fairly has removed all aspects of the dual school system, the persistence of these im-

States, 429 U.S. 990, 994-995 (1976) (Powell, J., concurring) (criticizing portions of a desegregation decree that attempted to remedy residential segregation). *Swann* explained that efforts to remedy such wide-ranging problems in the context of a desegregation case would detract from the core purpose at hand—removal of the dual school system. Thus, in the lower courts the focus has been, quite properly, on the *Green* factors alone, which deal strictly with aspects of the school system itself.[8] See, *e.g.*, *Ross* v. *Houston Independent School District*, 699 F.2d 218, 225-228 (5th Cir. 1983). See also *Dowell*, 111 S. Ct.

balances in other areas of society—whatever their initial cause—must be considered, as a matter of law, "too attenuated to be a vestige of former school segregation," *Dowell*, 111 S. Ct. at 638 n.2; see *Keyes* v. *School District No. 1*, 413 U.S. 189, 211 (1973) ("at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of de jure segregation warranting judicial intervention"); cf. *Mount Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 287 (1974) (under the First and Fourteenth Amendments, employer is not liable for wrongful termination if factors other than exercise of protected rights would have caused termination even in the absence of illegitimate factors).

[8] In *Green* v. *County School Board*, 391 U.S. 430 (1968), the Court set forth six facets of school operations—student assignment, faculty, staff, transportation, extracurricular activities, and facilities—that bear on the question of whether school officials are operating a dual school system. *Id.* at 435. Since *Green*, the Court repeatedly has emphasized the importance of these factors. See, *e.g.*, *Swann*, 402 U.S. at 18 (stating that "existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities" are "among the most important indicia of a segregated system"); *Keyes* v. *School District No. 1*, 413 U.S. 189, 196 (1973) (focusing on the *Green* factors and noting that "[i]n addition to the racial and ethnic composition of a school's student body, other factors, such as the racial and ethnic composition of faculty and staff and the community and administration attitudes toward the school, must be taken into consideration"); *Dowell*, 111 S. Ct. at 638.

at 638 (noting that the school board need remove vestiges of discrimination only "to the extent practicable").[9]

B. The Court of Appeals Erred in Determining that Racial Imbalances in the Student Assignments in This Case Were Remnants of Unlawful Discrimination Even Though the District Court Found that the Imbalances Were Not Caused by the School District

Application of the principles discussed above demonstrates that the court of appeals erred in rejecting the district court's conclusion that the DCSS had satisfied its constitutional obligations with respect to student assign-

[9] Strong practical reasons bolster *Swann*'s teaching that a school desegregation case is not a proper vehicle for addressing social problems outside the context of the school system, even if an expert witness can devise a theory under which the problems partially are attributable to prior invidious discrimination. For example, it can be argued that because the segregated system afforded inferior educational opportunities for prior generations of minority students, the descendants of those students also have been impeded, for socioeconomic reasons, from reaching their full academic potential. Although it certainly may be permissible to institute programs to deal with such problems in the first instance, *Milliken II*, 433 U.S. at 283-288, to maintain jurisdiction until such amorphous effects are eliminated is to guarantee that federal court supervision will operate virtually in perpetuity. Contra *Dowell*, 111 S. Ct. at 637 (desegregation decrees are "not intended to operate in perpetuity"). See *School Board* v. *Baliles*, 829 F.2d 1308, 1312-1314 (4th Cir. 1987) (declining to consider, in unitariness consideration, the claim that segregated system had exacerbated minority poverty, which in turn led to continued "educational deprivation" for blacks: "Educational deficiencies that result from problems such as poverty are best remedied by programs directed toward eliminating poverty, not by indirect solutions through school programs"). Federal court supervision of a school district on the basis of all disparities that are traceable in part to the previously segregated educational system will lead to "remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 276 (1986) (plurality opinion of Powell, J.).

ments. The district court found that the DCSS had complied with the decree for more than 16 years—from June 1969 to January 1986—before seeking a declaration of unitary status. Pet. App. 26a-27a. It also found that the plaintiffs had conceded that the plan imposed by the decree "did, for a time, result in the desegregation of the schools of DeKalb County." *Id.* at 33a. Finally, the district court concluded that demographic shifts unrelated to prior invidious discrimination caused the racial imbalances now existing in the DeKalb schools. *Id.* at 44a-45a. In fact, the district court concluded that the demographic shifts had such overwhelming force that "the same racial segregation would have occurred at approximately the same speed" in spite of any further action by the DCSS. *Id.* at 45.

The court of appeals, however, considered these findings irrelevant. Not only did it not agree with the district court's conclusion that the DCSS had fulfilled all of its obligations with respect to student assignments—and thus was entitled to be freed from continuing judicial supervision in that area—it ordered the district court to impose new and additional remedial obligations on the DCSS. Rejecting the district court's focus on the actual cause of the existing imbalances, it concluded that the DCSS was required to take whatever steps were necessary to alleviate the racial imbalances in student assignments. Its conclusion seems to rest on two related premises: first, that "demographic changes [cannot] constitute legal cause for racial imbalance in the schools" while a desegregation decree is pending, Pet. App. 20a (quoting *Lee* v. *Macon County Board of Education*, 616 F.2d 805, 810 (5th Cir. 1980)); and second, that the federal remedial power reaches any imbalance (whether in student assignments or elsewhere) that arises during the pendency of a court order to desegregate, without regard to whether that particular imbalance was caused by prior invidious discrimination, Pet. App. 14a-15a, 19a-20a. Both of these premises are incorrect.

The flawed nature of the first premise is demonstrated by a brief review of this Court's decision in *Spangler*, which held that a school board that is complying with a valid court-ordered desegregation plan cannot be required to alter attendance zones in response to demographic shifts unrelated to any of its past segregative actions.

In 1970 a federal district court ordered the Pasadena school board to adopt a desegregation plan requiring that no school have a majority of minority students. See *Spangler*, 427 U.S. at 427-428. During its first year of implementation, the school board complied with the court's plan in all respects. See *id.* at 431. In 1971, however, residential patterns began to shift. See *id.* at 431, 435. By 1974, five of Pasadena's thirty-two schools had a minority enrollment that exceeded fifty percent. See *id.* at 435. Accordingly, the school board asked the district court to relieve it of the requirement that no school have a majority of minority students. The record indicated that "[t]here was * * * no showing that [the] post-1971 changes in the racial mix of some Pasadena schools * * * were in any manner caused by [the school board's] segregative actions." *Ibid.* The district court, "apparently believ[ing] it had authority to impose [the no-majority] requirement even though subsequent changes in the racial mix in the Pasadena schools might [have] be[en] caused by factors for which the [school board] could not be considered responsible," refused to modify its order. *Id.* at 434.[10]

After a divided panel of the Ninth Circuit affirmed, this Court reversed, holding that the district court "exceeded its authority" by continuing to impose a requirement of racial balance without a showing that the school board was responsible for intervening changes in the racial composition of the schools. 427 U.S. at 435. This

[10] The district court explained that, in its mind, the 1970 order "meant to me that at least during my lifetime there would be no majority of any minority in any school in Pasadena." *Spangler*, 427 U.S. at 433.

Court stated that the "limits beyond which a court may not go in seeking to dismantle a dual school system are * * * tied to the necessity of establishing that school authorities have in some manner caused unconstitutional segregation." *Id.* at 434. Quoting *Swann*, 402 U.S. at 31-32, this Court further explained:

> It does not follow that communities served by [unitary] systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.

427 U.S. at 436 (bracketed insertion by *Spangler* Court). Thus, because the Pasadena school board had implemented "a plan designed to obtain racial neutrality in the attendance of students at Pasadena's public schools" and any racial imbalance that existed was "not attribut[able] to any segregative actions on the part of [the school board]," the school board could not be required to respond to the changes in attendance patterns. *Ibid.* This Court concluded its analysis by stating that the district court, "having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, * * * had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns." *Id.* at 436-437. This reasoning flatly contradicts the conclusion of the court of appeals in this case that school boards must remedy attendance imbalances attributable to demographic shifts that the school board has not caused whenever those imbalances arise during the pendency of a desegregation decree.

Nor is there any support for the court of appeals' second premise, that any imbalance arising in the school system while vestiges of discrimination still remain in

other facets of the school district's operations is itself a vestige that must be cured, for this is tantamount to a holding that the districts must remove *all* racial imbalances, without regard to cause. Such a holding would contradict this Court's conclusion that "desegregation * * * does not require any particular racial balance," *Milliken I*, 418 U.S. at 740-741. As this Court explained in *Swann*, the "constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole," 402 U.S. at 24, nor does "the existence of some small number of one-race * * * schools within a district * * * in and of itself" indicate unlawful discrimination, *id.* at 26; see also *Spangler*, 427 U.S. at 438; *Wright*, 407 U.S. at 464 (1972).[11] In sum, racial imbalance cannot be a cognizable vestige of discrimination if the imbalance results from causes external to the school board and its actions, as the district court found to be the case here.

Because of its erroneous view that a school board must eliminate all racial imbalances within the schools regardless of their cause, the court of appeals did not consider the correctness of the district court's factual findings (Pet. App. 44a-45a) that the racial imbalances that now exist

[11] Congress similarly has defined "desegregation" in terms of sorting by race, and rejected any definition hinging on racial balance. See 42 U.S.C. 2000c(b) (" 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, sex or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance"); see also 42 U.S.C. 2000c-6(a); 20 U.S.C. 1704, 1705, 1707, 1720(d), 1751. Although the Court concluded in *Swann* that 42 U.S.C. 2000c(b) and 2000c-6 were not intended to limit the "historical equitable remedial powers" of the federal courts, it also indicated that these statutes were intended not to create a cause of action "where racial imbalance exists in the schools *but with no showing that this was brought about by discriminatory action of state authorities.*" 402 U.S. at 17-18 (emphasis added). The latter situation is precisely what is at issue here.

in student assignments did not result from any invidious discrimination by the DCSS. Accordingly, this Court should remand the case to the court of appeals with instructions that it review these findings under the clearly erroneous standard of Federal Rule of Civil Procedure 52(a). See *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-576 (1985); *Rogers* v. *Lodge*, 458 U.S. 613, 622-623 (1982).[12]

If the court of appeals concludes on remand that the district court correctly found that the racial imbalance that currently exists in the DeKalb schools is not attributable to any of the actions of the DCSS, then it should not order the DCSS to take further action to eliminate the imbalance. If, on the other hand, the court of appeals finds that unlawful actions of the DCSS caused the racial imbalance, it may order the DCSS to eliminate that portion of the imbalance in student assignment that its unconstitutional actions have caused.

II. A FEDERAL COURT MAY REQUIRE NO FURTHER ACTION WITH RESPECT TO A FACET OF A SCHOOL SYSTEM ONCE THAT FACET IS FULLY DESEGREGATED

As we have explained above, if the court of appeals affirms the finding of the district court as to the cause of the racial imbalance within the DeKalb schools, it should remove the new remedial obligations imposed by the decision at hand. It then would need to decide whether that finding—that the DCSS successfully has satisfied its constitutional obligations with respect to student assignments—also requires a termination of judicial supervision of student assignments in the DCSS schools. In the course

[12] The undisputed and massive demographic shifts and the conceded initial success of the desegregation plan provide, in our view, ample support for the district court's findings. But their propriety need not be considered by this Court in the first instance. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404, 414 (1982).

of its reasoning justifying imposition of the new remedies, the court of appeals concluded that the federal courts should maintain jurisdiction and supervisory control of *all* aspects of the local schools until the school board successfully has satisfied its constitutional obligations in all facets of the schools.

This issue frequently has been debated in terms of whether "unitariness" may be achieved incrementally. See Pet. 11, 13-14; Pet. App. 15a-16a; *Morgan* v. *Nucci*, 831 F.2d 313 (1st Cir. 1987) (holding that a school district can become unitary in increments). We generally agree with the concept of incremental unitariness reflected in *Morgan*'s holding that it may be appropriate to release a school district from federal supervision of student assignments before releasing it from supervision over other facets of the school system that continue to contain remnants of invidious discrimination, but we doubt that the phrase itself sheds much light on the analysis a court should apply in these cases. As this Court noted in *Dowell*, the word "unitary" is found nowhere in the Constitution. 111 S. Ct. at 636. Moreover, a focus on formal rites of passage to some magical "unitary status" diverts attention from the basic propositions outlined above regarding the scope of a federal court's remedial authority in a school desegregation case.

We believe the issue is better approached in terms of whether there remains a basis for continued judicial displacement of local authority with respect to a particular facet of school operations. As we discussed at page 10, *supra*, the initial basis for the court's supervision of the school district's operations is the commonsense notion that at the commencement of a case involving de jure segregation of the schools, courts need not credit a school board's self-serving affirmations that it will change its ways and comply with the dictates of the Equal Protection Clause. But after a school board has removed all vestiges of discrimination from a particular area to the extent practicable and has complied with the court's orders for

a time period sufficient to satisfy its constitutional obligations in the area in question, there no longer is an adequate reason for the court's continued prophylactic supervision of the school district's operations in that area.

Spangler reinforces this conclusion. There, this Court refused to allow a district court to require the Pasadena school board to take further action with regard to student assignments, even though it was possible that the school board had "not yet totally" dismantled the vestiges of the dual system in the other aspects of school operations. 427 U.S. at 436, 438 n.5; see also *id.* at 442 (Marshall, J., dissenting). As this Court explained, the existence of a "dispute as to [the school board's] compliance with those portions of the plan specifying procedures for hiring and promoting teachers and administrators * * * does not undercut the force of the principle [that] * * * the [d]istrict [c]ourt was not entitled to require the [school board] to rearrange its attendance zones each year so as to ensure [a certain] racial mix" of students. *Id.* at 436. Having "once implemented a racially neutral attendance pattern" that "accomplished that objective," the court had "fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns." *Id.* at 436-437 (emphasis omitted). Finally, although this Court did not expressly decide the point, it stated that it was "clear" that there was "little substance" in the plaintiffs' argument that remaining problems in other aspects of the school system could alter this conclusion and justify continued enforcement of the portions of the desegregation decree related to student assignments. *Id.* at 438 n.5; see also *Morgan* v. *Nucci*, 831 F.2d at 318-319; *Flax* v. *Potts*, 915 F.2d 155, 158-159 (5th Cir. 1990).

Once a court finds that a school district has satisfied its constitutional obligations with respect to an aspect of its operations (such as student assignments), then, as the *Dowell* Court explained, the district "no longer requires court authorization for the promulgation of policies and rules" in that area. 111 S. Ct. at 638. At that point, the

court should evaluate future challenges to the school board's actions in that area under the general principles of this Court's Equal Protection jurisprudence, under which disproportionate impact is insufficient to establish a violation in the absence of intentional discrimination. See *Dowell*, 111 S. Ct. at 638. Of course, in determining whether a proposed change in the student assignment plan rests on an illicit motive, a court evaluating an intentional discrimination challenge should consider all relevant factors, including the history of segregation in the school system, the likelihood that the new plan will lead to racially identifiable schools (as far as that likelihood might suggest an illicit motive), the period during which the school board lawfully has complied with the decree, and the reasons proffered to explain the proposed change. See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-268 (1977); *Penick*, 443 U.S. at 464-465.[13] In general, though, absent conduct that traverses these constitutional limits, a formerly segregated school system should have available to it the same, full range of legitimate educational choices—neighborhood schools, choice programs, magnet schools, and so forth—and be held to the same level of accountability by parents, as other school systems.

This does not suggest, however, any change in the court's approach in the areas from which the dual system has not yet totally been removed; in that context, official action that has a segregative effect still should be held unlawful. See, *e.g.*, *Wright*, 407 U.S. at 462; *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 538 (1979) In those areas, the school board still has the burden of ensuring that its actions do not serve to perpetuate or re-establish the dual school system.

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[13] At that point, the burden will be on the plaintiffs to demonstrate that the school board has engaged in purposeful discrimination. See *Washington* v. *Davis*, 426 U.S. 229, 241 (1976); *Riddick* v. *School Bd.*, 784 F.2d 521, 538 (4th Cir.), cert. denied, 479 U.S. 938 (1986); *Oliver* v. *Kalamazoo Board of Education*, 640 F.2d 782, 810-811 (6th Cir. 1980).

In sum, if the court of appeals agrees with the district court's findings that the racial imbalances within the DeKalb schools were caused by demographic changes rather than invidious acts of the school board, then the vestiges of a dual system will have been eliminated as to student assignments, transportation, extracurricular activities, and facilities. See note 4, *supra*. Accordingly, the court should not require further action in those areas unless the DCSS intentionally discriminates in the future. As to the areas that were not fully desegregated at the time of the district court's decision—allocation of faculty, staff, and educational resources—the lower courts would retain authority under the decree to enjoin official actions that have a segregative effect in those areas and have no overriding educational justification, until such time as all the remnants of a dual system have been removed from those areas.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for consideration of whether the district court's factual findings were clearly erroneous.

Respectfully submitted.

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